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Supreme Court of the United States

October Term, 1942.

No. 948.

ANTONIO STORNELLI,

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Dated: May 19th, 1943.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Antonio Stornelli, for his Brief in opposition to the Petition for a Writ of Certiorari to review the Judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled action, affirming the Judgment of the United States District Court for the Western District of New York respectfully shows:

1. That the Decision here by the Circuit Court of Appeals for the Second Circuit, is not in conflict with the Decision of any other Circuit Court of Appeals in the same matter.

2. That the United States Circuit Court of Appeals for the Second Circuit in its Decision herein, has not decided

any important question of local law in conflict with the applicable local decisions.

3. That there is no important question of Federal Law herein concerned which has not hitherto been decided or which requires any settlement thereof by this Court.

4. That the Decision of the Circuit Court of Appeals for the Second Circuit herein, is not in conflict with applicable decisions of this Court.

5. That the Circuit Court of Appeals for the Second Circuit in its decision herein has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such departure, thus there is no reason for this Court to exercise its power of supervision herein.

Statement of the Case.

The respondent herein was employed by the petitioner in its mines at Oakfield, Genesee County, New York and while there employed and as a result of his employment he sustained lung injuries because of the failure on the part of the employer-petitioner herein, to provide a suitable and proper air current to remove impure air laden with noxious dusts (Fols. 170, 173, 213, 221), with the result that the respondent's lungs were invaded by silica and other dusts causing the respondent to receive substantial personal injuries, taking the form of a physical condition known as pneumoconiosis and industrial fibrosis. (Fols. 770, 771, 755, 757, 749, 780, 781, 786, 818.)

To recover damages for these injuries, the plaintiff sued and a jury, sitting in the United States District Court for

the Western District of New York, rendered a verdict in favor of the respondent on all of the issues in the action and awarded him money damages which as reduced by the Trial Court, amounted to Five Thousand Dollars, for which sum Judgment was duly entered.

The defendant-petitioner appealed and after argument by counsel for both parties, and after a careful examination of the law and facts, the United States Circuit Court of Appeals for the Second Circuit, duly handed down its Opinion (copy of which is annexed to the petition), affirming the judgment.

The case presented for the determination of the jury, questions of fact as to the defendant's liability for the injuries sustained and as to the defendant's failure to comply with section 417 of the Labor Law of the State of New York. The verdict arrived at by the jury was fully justified both upon the issues of the defendant's failure to comply with the provisions of the New York State Labor Law, and upon the medical proof, and certainly no unusual circumstances were presented, calling for, or justifying or requiring intervention by the Supreme Court of the United States. The Judgment of Affirmance by the United States Circuit Court of Appeals was by a unanimous Court, the opinion being written by Hon. Learned Hand, Circuit Judge.

There are no questions in this case which are of particular importance or concern, and the verdict of the jury is that in an ordinary personal injury action. The plaintiff in his work was exposed to large quantities of silica and other dusts generated in the mining operations carried on in the defendant's mine. He worked in rooms of ap-

proximately three foot six to four feet in height (Fol. 405) had no protective device of any kind given him by the defendant, (Fol. 231) and the air current which was supplied to the mine did not function in a proper manner on various occasions because of the fact that doors which were provided across the main passage-ways into the mine and which were supposed to have been kept closed when trains of cars were not running through the mine to take out rock or to bring back the empty cars, were not kept closed on various occasions, and were left open for extended periods by the defendant and its employees, (Fols. 319, 336) with the result that the air current which was generated did not, in many instances, reach the places where the respondent worked at various remote areas of the mine, with the result that large quantitites of silica-laden dust remained in the air for varying periods of time extending into hours on occasions during the working day. (Fols. 170, 336.) The failure to close these doors promptly after trains had passed through instead of hooking them back, permitted the air current to be diverted and to leak back into the general passageway or motor way and to escape out of the entrance shaft instead of going where it should have gone to the remote areas of the mine where these drilling operations were being carried on. (Fol. 213.) The testimony as to the fineness of the silica particles given by Prof. James E. Maynard of Syracuse University (Fol. 542) clearly established that of the free silica portion of the rock, over fifty percent of the particles were under the breathing size of ten microns and capable of being, as a consequence, imbedded when breathed in the alveoli of the respondent's lungs. (Fols. 562, 566, 569, 817.) This testimony was undisputed and although the defendant produced medical proof (Fols. 739-741) that the respondent was not injured by breathing this dust, the respondent produced competent medical proof to

show that he was there injured by breathing this dust, his chest expansion being but 1¼ inches on that account (Fol. 751) and had contracted pneumoconiosis, siliosis and fibrosis. (Fols. 751, 768, 771, 782, 819, 932, 940.)

The testimony of the plaintiff's witness as to the operation of the doors referred to was also practically undisputed. (Fols. 219, 336.)

The issues of the case presented questions of fact for the Jury.

POINT I.

The Labor Law of the State of New York required the defendant to provide an air current sufficient to insure the safety of its employees.

The defendant in its brief, claims that this statute did not require the employer to remove air laden with noxious dusts. Such construction or conclusion is wholly unwarranted. The duty of the defendant under the statute was to provide an air current which was *in fact sufficient to insure the safety of the employees.* It made no difference as to whether or not the defendant exercised reasonable care to do this. *He was required by the statute to do it, and defendant could not excuse itself for not doing it by saying that it exercised reasonable care. Reasonable care to provide suitable ventilation was the test at common law. The duty under the Statute is to provide an air current which shall be in fact sufficient to insure the safety.*

The defendant seeks to bring hair line distinction and say that there is no difference between the duty to exercise

reasonable care and the duty imposed by the statute. Such kind of argument is without effect because of the very language of the statute and the fact that it requires that the air current shall be "sufficient * * * to insure the safety of every employee" (New York State Labor Law, Section 417).

The defendant cannot discharge itself of its duty to this respondent by merely saying that it exercised reasonable care.

All of the cases cited by the defendant as to the common law duty of the employer, it will be noted, have to do with reasonable care.

This is clearly illustrated by the citation in Petitioner's Brief at page 21 as to the Common Law duty wherein the defendant states "A master who is engaged in the business of mining is bound to use reasonable care to make the place of work *reasonably* safe" and again at the same place the defendant quotes from 39 *Corpus Juris* and says, speaking of the common law duty * * * "It is the common law duty of the operator to use *ordinary care* to furnish sufficient ventilation * * *." The use by the defendant of ordinary care to furnish sufficient ventilation satisfied the obligation of the common law. *The statutory obligation is not satisfied in this matter. The use of ordinary care or of reasonable care is immaterial.* The duty is upon the employer to furnish an air current which is *in fact sufficient* (*not to use ordinary care*) *but to furnish sufficient ventilation to insure the safety of this and every employee.* It is readily evident therefore, that the statute created and placed upon the defendant, *a duty substantially greater than the obligation resting upon this defendant under the common law.*

It is also readily apparent that the Legislature certainly had in mind the changing of the common law obligation when it enacted the statute.

This is much more readily apparent because *formerly the statute merely required the Commissioner of Labor to use precautions looking to the safety of the health of employees.*

In the case of

Mautewich vs. United States Gypsum Company, 217 N. Y. 593,

to which counsel refers in his brief (page 18), *the Court of Appeals of the State of New York, did not construe the present statute and its determination in that case construing another previous statute was to the effect that even there the Legislature "intended to supplement the common law rules relating thereto and thereby further to insure the safety of those employed in such dangerous employments."*

This Opinion was written in April 1916, years before the opinion of the same Court of Appeals in the case of Schmidt vs. Merchants Despatch Transportation Company was written in 1935. It is quite likely that had the question been raised in the Mautewich case as to the applicability of the six-year statute of limitation, in the event such a cause of action was properly pleaded as in the Schmidt case, *the Court of Appeals would likewise have determined that the plaintiff there was entitled to the benefit of a six-year statute of limitation. No such question was raised or determined in the Mautewich case, and counsel's statement at page twelve with reference thereto, is misleading and incorrect.* It is true that there the Court of Appeals held that the common law duty was supplemented. Far from being an argument for the defendant, this is most cer-

tainly an argument for the plaintiff *because certainly when the Court of Appeals stated that the common law duty or rules were supplemented, it meant that a new duty had arisen. This new duty is now in a still more forcible form in the present section 417.*

No claim of industrial disease was before the Court in the Mautewich case. The claim there involved was solely as to the employer's liability because of an explosion of dynamite. The Court of Appeals declined to interfere with the verdict of the jury in favor of the plaintiff and here the Circuit Court of Appeals has declined to interfere with the verdict of the jury in favor of this plaintiff against this same defendant. This Supreme Court of the United States has previously declined to interfere with the verdict of the jury in the case of Dominick Galeota against this same defendant, October 1941 term. There is no more reason now than there was then as to why this Court should concern itself with cases of this nature in which the law is now so well established.

It should be noted that the obligation imposed by the Statute is two-fold:

First, the Statute requires that the air current must be sufficient to remove smoke and noxious gases. The Statute *further* requires that the air current must be sufficient to insure the safety of every employee.

Violation of either of these obligations constitutes a breach of the Statute. It was not necessary at all for the Legislature to have said that the air current must be sufficient to insure the safety of employees, if it had only in mind removal of smoke and noxious gases.

The Legislature could well have stopped after it had said that the air current must be sufficient to remove smoke and noxious gases if that was the only obligation it meant to impose.

The argument of the defendant is without weight in this regard. If, for instance, the air current which was provided by the defendant, was contaminated with noxious and poisonous dusts and was circulated to various places in the mine where men were working, the defendant *could not then well be heard to say that the Statute had not been violated.* Here we have a clear and distinct evidence of air poisoned with free silica dust particles of breathing size moving about place to place in the mine *because of the failure of the defendant to remove this silica-laden air by a sufficient air current.*

The duty of the defendant was to provide an air current "sufficient to insure the safety of every employee." *Such an obligation and duty was not discharged by providing an air current laden with silica dust and such an air current certainly was not "an air current sufficient to insure the safety of every employee."* The use of the words "air current" in the Statute certainly *meant an uncontaminated air current and not a contaminated one* and not one contaminated with silica dust. So it is easy to see that the argument of the defendant in this particular regard is without force or effect.

So it makes no difference whether or not air containing dust is a noxious gas or not because separate and apart from that we find in the Statute the language an "air current sufficient to insure the safety of every employee." Certainly the obligation to supply "an air current sufficient to insure the safety of employees" is not met by supplying

an air current contaminated with fine particles of free silica dust of such a size as to be capable of being breathed by employees including this plaintiff, into the respiratory tract, *causing injury and disease for which neither nature nor science has yet been able to provide any cure.*

The Statute is a protective one. It is a humane one, and we are satisfied that this Court is not to be swayed by the play upon words set forth in the brief of the petitioner. Such an argument cannot be sincere, neither can it be sufficient to call upon this great Court to reach down and say that the New York Legislature when it enacted Section 417 of the State Labor Law, did not intend to change the Common Law. Clearly the Common Law has been changed by a wise and beneficent legislature. Clearly the Statute was violated and the plaintiff injured because of the violation; the extent and cause of these injuries being here properly for the jury.

The argument of the defendant as to the necessity of establishing the exact silica content of the air breathed by the plaintiff at particular times, is fully answered by the refusal of this Court to entertain Certiorari in the Galeota case, the same type of argument being used, and the United States Circuit Court of Appeals answering that argument in the reasoning of the Court in

Downing vs. Oxwell Acetylene Co., 169 Atl. 709, in which it was in a well-reasoned opinion determined that where the injurious or poisonous substance is present in the place of employment, it is not necessary for an injured person to prove the amount of the poison or injurious substance present at any particular time *where it appears that the injured party is suffering from a disease caused or engendered by a substance of that same nature.*

Clearly to require the contrary would put the plaintiff in personal injury actions of this nature, to an impossible task. The law neither expects nor requires it and the Downing case is a complete answer to that line of argument, set forth in petitioner's brief at page 22.

POINT II.

Under the New York State Labor Law Section 417, and New York Civil Practice Act, Section 48 Subdivision 2, the plaintiff was entitled to the benefit of a six year statute of limitations.

The argument of the defendant in this respect is to the effect that the plaintiff is not entitled to the benefit of a six-year statute of limitations in cases involving personal injuries to miners, caused by the failure on the part of the defendant to comply with section 417.

This Court has already determined in the case of

Michalek vs. United States Gypsum Company (this same defendant) 298 U. S. 639,

and the Court of Appeals of the State of New York, has already determined similarly in

Schmidt vs. Merchants Despatch Transportation Co., 270 N. Y. 287,

that a working man such as this plaintiff, when injured because of the inhalation of silica dust, has a right to the protection of the six-year statute of limitations, where the State statute with reference to sufficient ventilation has been violated. This Court may recall that the disease of pneumoconiosis is a subtle one and that the disease does not become apparent in many cases until a long time after exposure. In many instances, the plaintiffs in cases of this nature are not able to sue within the ordinary three years

applicable to the usual negligence action under the New York Statute (New York Civil Practice Act Section 49 Subdivision 6), and the Schmidt case was an outstanding illustration of a working man who had been examined twice within the three-year period, the X-rays failing to show the damage done by the silica dust until the third examination, which was had after the expiration of the three years. He brought his action under the New York Statute, claiming that he was entitled to the benefit of the six-year statute of limitation for *breach of his employer of a duty imposed by statute* under the New York Labor Law. *The Court of Appeals held with him, as likewise did this Court hold with the plaintiff Michalek against the United States Gypsum Company, the same defendant, in the case above cited.*

Section 417 of the New York State Labor Law most certainly imposes an additional obligation to that which existed at common law, and for this reason, this plaintiff suing under its provisions, is entitled similarly to the benefit of a six-year statute of limitations. His case was commenced within the six-year peroid.

Section 417 is not declaratory of the common law; the Courts of the State of New York have so held.

Hegierski vs. United States Gypsum Company. Decision of Mr. Justice Hickey in Supreme Court, Erie County, decided April 29, 1943.

In that case the defendant had similarly raised the same question as it did raise here, both in the Trial Court and in the Circuit Court of Appeals. The Supreme Court of the State of New York in the Hegierski case found the contention to be without merit and denied this defendant's application to dismiss the complaint. A copy of the Decision of the Court in that case is annexed hereto.

Under the determination of this Court in

Erie Railroad Company against Tompkins, 304 U. S. 64,

it is our understanding that the United States District Courts are bound to follow the law as laid down by the State Courts in which the United States District Court is located. The Hegierski decision by the Supreme Court of the State of New York, is a complete answer to the argument of counsel for the defendant. The Schmidt case is a complete answer to the argument of counsel, and the Michalek case in this Court, is likewise a complete answer.

Recently this Court, did at the October 1941 Term, deny the petition of this same defendant for a writ of certiorari to the same Circuit Court of Appeals in the action, of Dominico Galeota vs. United States Gypsum Company, No. 893, October 1941 Term. There this Court found that the contentions of this same defendant were without merit in that action brought to recover damages for personal injuries sustained in the same mine at or about the same time by the plaintiff in that action, of whom this plaintiff was a fellow-workman. (Fol. 160.)

It seems to be the policy of this defendant to apply for Certiorari to the Supreme Court of the United States in every case in which it loses the verdict before a trial jury, and the plaintiff's Judgment is affirmed by the United States Circuit Court of Appeals. We feel that the time has come when this Court ought to definitely discourage such applications which are apparently made as a matter of routine by this defendant.

Respectfully submitted,

WILLIAM L. CLAY,
Attorney for Respondent,
510 Powers Bldg.,
Rochester, N. Y.

At a Special Term of the Supreme Court held in and for the Eighth Judicial District at the Erie County Hall in the City of Buffalo, New York, on the 29th day of April, 1943.

Present: Hon. William J. Hickey,
Justice Presiding.

STATE OF NEW YORK.

SUPREME COURT—COUNTY OF GENESEE.

WILLIAM HEGIERSKI, as Administrator of the Estate of John Hegierski, Deceased,
Plaintiff,
vs.
UNITED STATES GYPSUM COMPANY,
Defendant.

The defendant above named having duly moved this Court for an Order under Rule 107 of the Rules of Civil Practice for Judgment dismissing the cause of action set forth in the second amended complaint upon the ground that the said cause of action herein set forth did not accrue within the time limited by law for the commencement thereof, and for such other and further relief as to the Court might seem just and proper, and said Motion having duly come on to be heard before me at a Special Term of this Court appointed to be held in and for the Eighth Judicial District at the Erie County Hall in the City of Buffalo, New York, on the 29th day of April, 1943, and the defendant having appeared by Judd & Stakel, its attorneys in support thereof of said motion, and the plaintiff having appeared by William L. Clay, Esq., its attorney in opposi-

tion thereto, and said Motion having been duly argued and the Court having duly deliberated thereon and having made and filed its decision herein,

Now upon reading and filing the Notice of Motion dated the 19th day of April 1943, the affidavit of Everest A. Judd sworn to the 19th day of April 1943, the affidavit of David W. Daniel sworn to the 17th day of April, 1943, the second amended complaint herein in support of said motion, the affidavit of William L. Clay, Esq., sworn to the 29th day of April 1943 in opposition thereto, it is now, upon motion of William L. Clay, attorney for the plaintiff,

ORDERED that the second amended complaint herein is determined to set forth a cause of action for statutory breach to which the six-year Statute of Limitations provided by the Civil Practice Act of the State of New York applies, an action having been commenced by the decedent within six years from the date of the last employment by the defendant and said action being pending at the time of his death, and the present action having been commenced within two years after the date of the death of the said John Hegierski.

And it is further

ORDERED that the motion of the defendant be and the same hereby is in all respects denied, together with Ten Dollars costs.

Enter:

(Signed) WILLIAM H. HICKEY,
J. S. C.

(Signed) Russell C. Annabal,
Clerk.

O.K. as to
form
W. J. S.